Zango Inc v. PC Tools Pty Ltd Doc. 22

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZANGO, INC., Plaintiff, v. PC TOOLS PTY, LTD., Defendant.	Case No. 07-CV-00797-JCC **DECLARATION OF JOHN SARAPUK IN SUPPORT OF DEFENDANT'S OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER**

I, John Sarapuk, being first duly sworn, state as follows:

1. I am the Chief Operating Officer for PC Tools Research Pty Ltd ("PC Tools"). I have personal knowledge of the facts contained herein. I have personal knowledge of the matters stated in this Declaration. The source of my information is my own personal knowledge and information provided to me by other representatives of PC Tools Research Pty Ltd.

PC Tools and Its Product Called Spyware Doctor

2. PC Tools employs approximately 150 employees in Australia, with offices in Sydney and Melbourne.

3. Among other software products, PC Tools develops and makes available to computer users a software program called Spyware Doctor. Spyware Doctor has been downloaded over 100 million times; with a million more downloads every week.

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Telephone (206) 624-0900
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4. Spyware Doctor is PC Tools flagship product. Spyware Doctor regularly receives Editors' Choice awards from PC Magazine in the United States. In addition, after leading the market in 2005, Spyware Doctor was awarded the prestigious Best of the Year from PC Magazine at the end of 2005. Spyware Doctor continues to be awarded the highest honors by many of the world's leading PC publications such as PC Pro, PC Plus, PC Authority, PC Utilities, PC Advisor, PC Choice, Microdatorn, PC Answers Magazine, plus a number of reputable 5-star ratings including CNET's Download.com and Tucows.

5. PC Tools has developed Spyware Doctor as a fluid, frequently updated software program that analyzes third-party software residing on, or trying to install on, a user's computer. Spyware Doctor determines if such third-party software presents a risk to the security of the user's computer. There are various types of threats presented by third-party software (*e.g.*, spyware, adware, spyware trojans, keyloggers, identity theft, hijackers, tracking threats, rogue anti-spyware, unwanted software, phishing, popups and bad websites), and there are various levels of risk. Software presenting any potential risks to a user's computer is broadly and generically described in the industry as "malware."

6. PC Tools employs a team of software analysts in a unit it calls the Malware Research Centre, residing at PC Tools headquarters in Sydney, Australia. Analysts on the Malware Research Centre (MRC) team study third-party software by primarily using – but by no means exclusively relying upon – the AntiSpyware Coalition's Best Practices, which recently was adopted as guidance by a consortium of the leading anti-spyware companies in the world. The MRC also analyzes factors that differ from, and/or that are in addition to, the Best Practices document.

7. Factors used by the MRC team to analyze third-party software include: the potential harm or annoyance to users (such as excessive, intrusive or offensive advertising), the potential for disclosure of personal information and other data collection activities, the potential for loss of connectivity, the existence and substance of notice to the user and opportunity to

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consent, the visibility of the software publisher, the software's end user license agreement (EULA), the level of disclosure made the software publisher (including material implications of the use of the software on privacy, security, maintenance and performance of the computer), ease of use, the ability of the user to manage the software's files, whether the software publisher has digitally signed their code and content files and certified it to a root of trust, the value to users, randomized products names, folders and files, unlabeled advertisements, the software publisher's privacy policy, failure to uninstall completely upon user command, clean installation without additional components or illegitimate components, the public perception of the software, other security software products' classification of the software, and many, many other areas of inquiry. As can be seen, the process can take a substantial amount of time and effort, especially in light of the fact that the MRC has compiled a detection database identifying over 3,500 malicious and potentially unwanted software programs.

8. After comprehensive analysis, the MRC team assigns a level of risk using the following terms: Info & PUAs (Potentially Unwanted Applications) presenting no known risks; Low Risk; Medium Risk; Elevated Risk; and High Risk. See attached PC Tools web page (**Exhibit 1**) PC Tools tells its users that malware is constantly changing and evolving, and therefore infection risk levels may be updated without notice at any time. PC Tools does this by updating its detection database from time to time such that when Spyware Doctor runs on a user's computer, it measures the software residing on that user's computer against the most recent detection database.

9. Even software that may be regarded by some as useful may possess characteristics that PC Tools defines as malware. PC Tools tells its users that when they conduct a scan using Spyware Doctor, they should review all detected items before deciding to remove or quarantine a particular piece of software. In the end, it is ultimately the computer user's choice as to what to keep on their computer.

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10. The development and distribution of Spyware Doctor is based on the premise that PC Tools will continuously monitor third-party software for possible threats to the security of a user's computer on a daily basis. PC Tools' reputation in the marketplace rests entirely on developing and maintaining consumer trust that PC Tools will analyze and stay updated or ahead of third-party software presenting the latest computer security threats, will thoroughly study and assign an appropriate level of risk to such threats, and will notify users of such threats such that they can choose to remove and/or block such software threats from their computer.

11. Spyware Doctor (including the Starter Edition in the Google Pack) has an On Guard function that the user can choose to automatically detect and remove software programs classified as Low risk or higher. On Guard gives notice to the user about such removal, and the user can view the list of items detected and removed. If the user desires, the user may select certain programs for inclusion on the user's Global Action List (the "white-list"), which allows the user to specifically list programs as permitted programs, regardless of any classification made by PC Tools. On Guard does not automatically detect and remove programs classified as PUA. On Guard can be turned off by the user, who then may perform a manual or scheduled scan for programs. This "on-demand" scan will detect software programs classified as Info & PUA or higher, but the user must specifically choose to manually remove any programs. The inclusion of Info & PUA threats in the scan results also can be turned off by the user.

12. PC Tools distributes Spyware Doctor to both business and individuals. PC Tools distributes Spyware Doctor as a paid subscription and in certain arrangements as a free download. For example, PC Tools includes Spyware Doctor Starter Edition as part of a free download offered by Google in its "Google Pack" of computer software products.

13. PC Tools does not receive any compensation or benefits from third-party software providers in exchange for a certain classification of their software. PC Tools maintains an independent position, with its own protocols and decision-making. Maintaining this

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independence in the face of pressure by third-party software providers is one of the reasons PC Tools has the reputation of an industry leader.

Historical Classification of Zango Software

14. In the past, PC Tools classified all of Zango's programs as malicious with a High or Elevated risk classification. Zango was formerly known as 180 Solutions. Beginning in late 2004, Zango contacted PC Tools and requested that PC Tools reclassify Zango's programs such that they were not detected. PC Tools explained that its own independent analysis showed numerous, repeated and serious problems with Zango's software. Over the course of the next 18 months, Zango periodically contacted PC Tools and requested reclassification. Attached as **Exhibit 2** to this Declaration is a copy of the email chain between PC Tools and Zango during this time period.

15. On several occasions, Zango would make representations about the new and improved characteristics of its software. PC Tools would evaluate Zango's representations and find them to be false and deceptive because the software still contained harmful security threats.

16. Zango went so far as to victimize PC Tools itself. For example, visitors to PC Tools' website and the Spyware Doctor purchase page would find a page for competing products or rogue ("fake") anti-malware products cleverly overlaid on top with the same colors, fonts and text used by PC Tools. PC Tools discovered similar deception by Zango with respect to Symantec and MacAfee web pages (two noted software security firms).

17. During this time period, PC Tools learned that Zango was the subject of an investigation and complaint involving the United States Federal Trade Commission ("FTC"). The allegations against Zango included that it was using unfair and deceptive methods to download adware and obstruct consumers from removing it, in violation of U.S. law. Obviously this was of great concern to PC Tools, and materially impacted (if not completely eliminated) PC Tools' ability to reclassify Zango's software. The email chain shows that Zango fully recognized the impact, told PC Tools it understood "your need to provide protection to your

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customers," and told PC Tools "We understand and respect your obligation to label us in an appropriate manner."

18. Analysis and reclassification of the three Zango programs at issue has been complicated by the fact that our MRC team has observed components in the three programs that also were contained in Zango's malicious "legacy" malware. This required subdividing and assigning multiple and separate signature sets for threats; at times as many as 17 different components needed to be analyzed individually and collectively within Zango's software.

19. In this lawsuit, I have seen reference to an isolated statement from a Jim Meem email that Zango has extracted and proclaimed to be a conclusive admission. A simple review of the voluminous emails and discussion before Jim Meem's email, after Jim Meem's email, and even within Jim Meem's email, indicates that there were many qualifiers to that statement, and that the statement in no way was a proclamation or admission that Zango had a clean bill of health.

20. Attached as **Exhibit 3** to this Declaration is a report prepared at my direction by one of the MRC team software analysts, Nachiketa Thakur. The report contains screenshots and accompanying commentary, and reveals ongoing troublesome characteristics seen in Zango's software.

21. It is with this context and history that PC Tools has been extremely cautious with respect to the classification of Zango's software.

Current Classification of Zango Software

22. On or before May 14, 2007, before Zango filed its lawsuit, PC Tools made the independent decision to reclassify three of Zango's software programs (Seemko Search Assistant, Zango Search Assistant, and Hotbar) as PUAs (potentially unwanted applications). As a separate and independent matter, PC Tools also decided to modify Spyware Doctor to allow for PUAs to avoid being detected and removed by Spyware Doctor's auto-scan function (On Guard). This change was implemented by the introduction of Spyware Doctor version 5.0.0.185. This

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was not a Zango-specific decision; it was a business and policy decision by PC Tools that applied to all programs classified as PUAs.

23. As a result, the three Zango programs that Zango has put at issue are no longer automatically detected and removed by Spyware Doctor's On Guard auto-scan function because they are classified as PUA. If a user chooses not to use On Guard, and instead performs a manual scan, the user has a choice as to whether to keep the three Zango programs or not.

24. Regarding Spyware Doctor Starter Edition as included in the Google Pack, as of May 31, 2007, new users downloading the Google Pack receive Spyware Doctor version 5.0.0.185. (Previously, users downloading the Google Pack received Spyware Doctor version 5.0.0.184, which then was automatically updated to Spyware Doctor version 5.0.0.185 through a silent update that, if required, notified the user a reboot was required to apply the updates.) Existing users of Spyware Doctor Starter Edition as included in the Google Pack received this same update back on May 22, 2007. PC Tools informed Zango of this fact shortly thereafter.

25. Furthermore, the Spyware Doctor Starter Edition as included in the Google Pack has a Global Action List "white list" function. This allows users to specifically list programs as permitted programs, regardless of any classification made by PC Tools (even if PC Tools later reclassified Zango's programs to an elevated or high risk). Spyware Doctor does not immunize and forever prevent Zango's three programs from being loaded or maintained on the user's computer. The user always retains the ultimate decision-making authority and ability to allow software programs on its computer.

26. Other computer security software programs detect certain of Zango's three programs as malware. Attached as **Exhibit 4** to this Declaration are sample screenshots showing the detection screens from other security software programs.

Harm to PC Tools Should an Injunction Issue

27. With respect to the classification of Zango's software, PC Tools has acted with one overriding motivation and goal – to preserve its reputation as a leading computer security

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software provider and protect our users from potentially malicious software. PC Tools has not gained any revenue or other tangible benefit from labeling Zango's programs as malware in the past, and does not gain any such thing by doing so in the future. PC Tools does not market Spyware Doctor by stating that it detects Zango's programs, or by identifying anyone's programs for that matter. PC Tools does not compete in the same market as Zango; the two companies offer separate and distinct products.

28. If PC Tools were ordered by an injunction to reclassify Zango's programs to what Zango preferred the classification to be, one of the most crucial pillars supporting PC Tools' business model would be removed. PC Tools no longer would be able to assure its end users that PC Tools is continuously and adequately monitoring third-party software (*e.g.*, Zango's programs) for malware. Zango could modify its software after such an order, and PC Tools would be handcuffed by an injunction from providing its analysis and recommendations regarding computer security to its end users. In addition to the public being harmed by such a scenario, if such a precedent were set, other third-party software providers could file suit to litigate PC Tools' classification of their software. If they were able to obtain an injunction similar to that requested by Zango, the very nature of PC Tools' business would be eliminated because PC Tools' reputation would be irreparably damaged. Consumers could easily switch to one of many competitors in PC Tools' industry that was not prohibited from operating the very core of its business.

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Telephone (206) 624-0900

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my personal knowledge.

John Sarapuk

CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

- **Michael Rosenberger**
  mrosenberger@gordontilden.com,chudson@gordontilden.com, jbukowski@gordontilden.com

- **Jeffrey I Tilden**
  jtilden@gordontilden.com,eevans@gordontilden.com, jbukowski@gordontilden.com

- **Conor F Farley**
  cfarley@hollandhart.com

- **Tarek F M Saad**
  tfsaad@hollandhart.com

DATED: May 31, 2007 at Seattle, Washington.

/s/ ______________________________
J. Ronald Sim, WSBA No. 4888
Maren R. Norton, WSBA No. 35435
STOEL RIVES L.L.P.
600 University Street, Suite 3600
Seattle, WA 98101-3197
Telephone: 206-624-0900
Fax: 206-386-7500
jrsim@stoel.com
mnorton@stoel.com

ATTORNEYS FOR DEFENDANT

STOEL RIVES LLP
ATTORNEYS
600 University Street, Suite 3600, Seattle, WA 98101
Telephone (206) 624-0900